

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

DWAYNE ALLEN DAKE,

Plaintiff,

v.

MICHAEL J. ASTRUE, Commissioner  
of the Social Security Administration,

Defendant.

CASE NO. 11-CV-05980 JRC

ORDER ON PLAINTIFF'S  
COMPLAINT

This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and Local Magistrate Judge Rule MJR 13 (*see also* Notice of Initial Assignment to a U.S. Magistrate Judge and Consent Form, ECF No. 4; Consent to Proceed Before a United States Magistrate Judge, ECF No. 8). Plaintiff has filed an Opening Brief and defendant has filed a Response (*see* ECF Nos. 17, 21).

The ALJ failed to provide specific and legitimate reasons supported by substantial evidence in the record for his failure to credit the opinions of examining doctors and a

1 mental health social worker regarding plaintiff's specific functional limitations. For these  
2 reasons and based on the relevant record, the Court concludes that this matter should be  
3 reversed and remanded pursuant to sentence four of 42 U.S.C. § 405(g) to the  
4 Commissioner for further administrative proceedings.

#### 5 BACKGROUND

6 Plaintiff, DWAYNE ALLEN DAKE, was born in 1980 and was twenty-one years  
7 old on his alleged date of disability onset of February 28, 2001 (Tr. 140). Plaintiff was in  
8 special education classes and dropped out of high school before completing the 10<sup>th</sup> grade  
9 (Tr. 264). He had been diagnosed previously with attention deficit hyperactivity disorder  
10 ("ADHD"), depression, social anxiety disorder, bipolar, and post traumatic stress disorder  
11 ("PTSD") (Tr. 169). He has a history of closed head injury with loss of consciousness  
12 and methamphetamine dependence, in remission (Tr. 66). He used methamphetamine  
13 daily and heavily for approximately one and one-half years between 2002 and 2004 (Tr.  
14 264-65). He was in prison for five years and was released in December 2008 (*id.*).  
15 During his incarceration, he received mental health care and "competency restoration" at  
16 Western State Hospital in 2004. He also received out-treatment mental health care at  
17 Greater Lakes Mental Health (Tr. 263-64), as well as treatment for methamphetamine use  
18 (Tr. 265). He received his GED while in prison (Tr. 264).

19 His severe impairments include right knee arthralgia/joint pain, obesity,  
20 headaches, bipolar disorder, post-traumatic stress disorder, attention deficit disorder not  
21 otherwise specified, and methamphetamine dependence in remission (20 CFR  
22 416.920(c)) (Tr. 23-24). Plaintiff's appeal is centered only on his mental impairments.  
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1 Although he has worked sporadically, he has been unable to keep a job. His  
2 longest job was working security for three months (Tr. 264).

3 PROCEDURAL HISTORY

4 Plaintiff filed applications for supplemental security income on December 26,  
5 2008 (Tr. 74). His application was denied initially and following reconsideration (*id.* at  
6 74-75). His requested hearing was held before Administrative Law Judge Larry Kennedy  
7 (“the ALJ”) on January 27, 2011 and the ALJ issued a written decision on February 3,  
8 2011, concluding that plaintiff was not disabled under the Social Security Act (*see* Tr. 21-  
9 34).

10  
11 The Administration denied plaintiff’s request for a review (Tr. 1-5), making the  
12 written decision by the ALJ the final agency decision subject to judicial review (*id.*). *See*  
13 20 CFR § 404.981. In November of 2011, plaintiff filed a complaint in this Court  
14 seeking judicial review of the ALJ’s written decision (*see* ECF No. 1). On February 7,  
15 2012, defendant filed the sealed administration record on this matter (“Tr.”) (*see* ECF No.  
16 10).

17 In his Opening Brief, plaintiff challenges:

- 18 1. The ALJ’s finding regarding plaintiff’s residual functional capacity (“RFC”);
- 19 2. The ALJ’s finding regarding plaintiff’s credibility;
- 20 3. The ALJ’s review of the opinions of examining doctors, Christa Robbins, Ph.D  
21 and Colin Dauria, M.D., and those of Linda McNellis, MSW, LICSW, a  
22 mental health social worker; and  
23  
24

1 4. The ALJ's consideration of the evidence as a whole to determine if plaintiff  
2 met an administrative listing.

### 3 STANDARD OF REVIEW

4 Plaintiff bears the burden of proving disability within the meaning of the Social  
5 Security Act (hereinafter "the Act"). *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.  
6 1999); *see also Johnson v. Shalala*, 60 F.3d 1428, 1432 (9th Cir. 1995). The Act defines  
7 disability as the "inability to engage in any substantial gainful activity" due to a physical  
8 or mental impairment "which can be expected to result in death or which has lasted, or  
9 can be expected to last for a continuous period of not less than twelve months." 42 U.S.C.  
10 §§ 423(d)(1)(A), 1382c(a)(3)(A). Plaintiff is disabled under the Act only if plaintiff's  
11 impairments are of such severity that plaintiff is unable to do previous work, and cannot,  
12 considering plaintiff's age, education, and work experience, engage in any other  
13 substantial gainful activity existing in the national economy. 42 U.S.C. §§ 423(d)(2)(A),  
14 1382c(a)(3)(B); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098-99 (9th Cir. 1999).

16 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's  
17 denial of social security benefits if the ALJ's findings are based on legal error or not  
18 supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d  
19 1211, 1214 n.1 (9th Cir. 2005) (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir.  
20 1999)). "Substantial evidence" is more than a scintilla, less than a preponderance, and is  
21 such "relevant evidence as a reasonable mind might accept as adequate to support a  
22 conclusion." *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989) (*quoting Davis v.*  
23 *Heckler*, 868 F.2d 323, 325-26 (9th Cir. 1989)); *see also Richardson v. Perales*, 402 U.S.  
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1 389, 401 (1971). Regarding the question of whether or not substantial evidence supports  
2 the findings by the ALJ, the Court should “review the administrative record as a whole,  
3 weighing both the evidence that supports and that which detracts from the ALJ’s  
4 conclusion.” *Sandgathe v. Chater*, 108 F.3d 978, 980 (1996) (per curiam) (quoting  
5 *Andrews, supra*, 53 F.3d at 1039). In addition, the Court must determine independently  
6 whether or not “the Commissioner’s decision is (1) free of legal error and (2) is  
7 supported by substantial evidence.” See *Bruce v. Astrue*, 557 F.3d 1113, 1115 (9th Cir.  
8 2006) (citing *Moore v. Comm’r of the Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir.  
9 2002)); *Smolen v. Chater*, 80 F.3d 1273, 1279 (9th Cir. 1996).

11 According to the Ninth Circuit, “[l]ong-standing principles of administrative law  
12 require us to review the ALJ’s decision based on the reasoning and actual findings  
13 offered by the ALJ - - not *post hoc* rationalizations that attempt to intuit what the  
14 adjudicator may have been thinking.” *Bray v. Comm’r of SSA*, 554 F.3d 1219, 1226-27  
15 (9th Cir. 2009) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (other citation  
16 omitted)); see also *Molina v. Astrue*, 2012 U.S. App. LEXIS 6570 at \*42 (9th Cir. April  
17 2, 2012) (Dock. No. 10-16578); *Stout v. Commissioner of Soc. Sec.*, 454 F.3d 1050, 1054  
18 (9th Cir. 2006) (“we cannot affirm the decision of an agency on a ground that the agency  
19 did not invoke in making its decision”) (citations omitted). For example, “the ALJ, not  
20 the district court, is required to provide specific reasons for rejecting lay testimony.”  
21 *Stout, supra*, 454 F.3d at 1054 (citing *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir.  
22 1993)). In the context of social security appeals, legal errors committed by the ALJ may  
23 be considered harmless where the error is irrelevant to the ultimate disability conclusion  
24

1 when considering the record as a whole. *Molina, supra*, 2012 U.S. App. LEXIS 6570 at  
2 \*24-\*26, \*32-\*36, \*45-\*46; *see also* 28 U.S.C. § 2111; *Shinsheki v. Sanders*, 556 U.S.  
3 396, 407 (2009); *Stout, supra*, 454 F.3d at 1054-55.

#### 4 DISCUSSION

5 The issues raised by plaintiff largely revolve around the ALJ's consideration of the  
6 mental health evaluations and the resulting impact on plaintiff's residual functional  
7 capacity. Therefore, rather than dealing with each of plaintiff's issues in order, this  
8 Court will review the ALJ's handling of such evidence.

9  
10 In making his determination that plaintiff was capable of working, the ALJ relied  
11 principally on state agency psychologist consultants, who reviewed the record and found  
12 that plaintiff "was able to understand, remember, and carryout simple, repetitive, and  
13 some detailed tasks, and was able to make simple work-related decisions" (Tr. 30). The  
14 ALJ found that plaintiff would do best in work that required "no public contact and  
15 limited co-worker contact" (*id.*). He also concluded that these reviews were "consistent  
16 with the mental status examination findings" (*id.*). But they weren't.

17 In at least four portions of his written decision, the ALJ states that plaintiff's  
18 mental status examinations were relatively unremarkable and failed to document  
19 significant symptoms or limitations (*see* Tr. 28, 29, 30, 40). But, again, to the contrary,  
20 the information provided by the examining psychiatrist, psychologist and mental health  
21 therapist repeatedly set forth moderate to severe limitations in a number of areas, contrary  
22 to the ALJ's findings.  
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1 The ALJ must provide “clear and convincing” reasons for rejecting the  
2 uncontradicted opinion of either a treating or examining physician or psychologist.  
3 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996) (citing *Baxter v. Sullivan*, 923 F.2d  
4 1391, 1396 (9th Cir. 1991); *Pitzer v. Sullivan*, 908 F.2d 502, 506 (9th Cir. 1990)). Even if  
5 a treating or examining physician’s opinion is contradicted, that opinion “can only be  
6 rejected for specific and legitimate reasons that are supported by substantial evidence in  
7 the record.” *Lester, supra*, 81 F.3d at 830-31 (citing *Andrews v. Shalala*, 53 F.3d 1035,  
8 1043 (9th Cir. 1995)). The ALJ can accomplish this by “setting out a detailed and  
9 thorough summary of the facts and conflicting clinical evidence, stating his interpretation  
10 thereof, and making findings.” *Reddick, supra*, 157 F.3d at 725 (citing *Magallanes v.*  
11 *Bowen*, 881 F.2d 747, 751 (9th Cir. 1989)).

13 An examining physician’s opinion is “entitled to greater weight than the opinion  
14 of a nonexamining physician.” *Lester, supra*, 81 F.3d at 830 (citations omitted); *see also*  
15 20 C.F.R. § 404.1527(d).

16 According to Social Security Ruling (“SSR”) 96-8p, a residual functional capacity  
17 assessment by the ALJ “must always consider and address medical source opinions. If the  
18 RFC assessment conflicts with an opinion from a medical source, the adjudicator must  
19 explain why the opinion was not adopted.” SSR 96-8p, 1996 SSR LEXIS 5 at \*20.

20 Here, the ALJ relied almost exclusively on the reviewing consultants who had  
21 never examined or treated plaintiff (Tr. 30). And, contrary to the statements made by the  
22 ALJ, the examining physicians found marked and severe limitations.  
23  
24

1 Christa Robbins, PhD. examined plaintiff at the request of the Department of  
2 Social and Health Services on December 12, 2008 (Tr. 234). She noted marked  
3 limitations in the area of depressed mood, paranoid behavior and global illness, and  
4 severe limitations in the areas of social withdrawal, motor agitation, thought disorder and  
5 hyperactivity (Tr. 235). When assessing plaintiff's specific functional limitations relative  
6 to work activity, she noted marked limitation in his ability to perform routine tasks and a  
7 severe limitation in his ability to understand, remember and follow complex instructions  
8 (Tr. 236). Plaintiff also had marked limitations in his ability to respond appropriately to  
9 and tolerate pressures and expectations of a normal work setting (*id.*).  
10

11 The ALJ, rather than giving specific and legitimate reasons for rejecting this  
12 examining psychologist's conclusions, simply stated that Dr. Robbins' findings were  
13 consistent with moderate limitations (Tr. 25). *See Lester, supra*, 81 F.3d at 830-31. To the  
14 contrary, Dr. Robbins concluded that claimant's ADHD symptoms would interfere with  
15 his ability to function in work related activities (Tr. 236). She concluded that he was  
16 chronically mentally ill and this would impair his functionality for life (Tr. 237). At best,  
17 she concluded that with medication for ADHD claimant "might be able to work" (Tr.  
18 237). This is hardly a conclusion that is consistent with the state agency consultants or  
19 with the ALJ's findings. The ALJ must explain why his interpretations are more correct  
20 than those of the doctors. *See Reddick, supra*, 157 F.3d at 725.  
21

22 Furthermore, in reviewing Dr. Robbins' conclusions, the ALJ broadly stated that  
23 her conclusions were not consistent with claimant's subjective reports or significant  
24 objective findings and documented activities (Tr. 31). The ALJ did not set out a



1 “detailed and thorough summary of the facts” conflicting with these conclusions, as  
2 required. *See Reddick, supra*, 157 F.3d at 725 (citing *Magallanes v. Bowen*, 881 F.2d  
3 747, 751 (9th Cir. 1989).

4 The Court notes that “experienced clinicians attend to detail and subtlety in  
5 behavior, such as the affect accompanying thought or ideas, the significance of gesture or  
6 mannerism, and the unspoken message of conversation. The Mental Status Examination  
7 allows the organization, completion and communication of these observations.” Paula T.  
8 Trzepacz and Robert W. Baker, *The Psychiatric Mental Status Examination* 3 (Oxford  
9 University Press 1993). “Like the physical examination, the Mental Status Examination is  
10 termed the *objective* portion of the patient evaluation.” *Id.* at 4 (emphasis in original).

12 The ALJ also failed to provide specific and legitimate reasons for rejecting the  
13 opinions of examining physician Colin Dauria, M.D. *See Lester, supra*, 81 F.3d at 830-  
14 31. Dr. Dauria is a psychiatrist who performed a “comprehensive psychiatric evaluation”  
15 on April 23, 2009. He diagnosed plaintiff with a post-traumatic stress disorder, ADHD,  
16 not otherwise specified, methamphetamine dependence, with a history of closed head  
17 injury and a GAF score of 45 (Tr. 266). Dr. Dauria, in assessing plaintiff’s functional  
18 abilities, concluded as follows:

19 The claimant is not capable of managing his own finances at this  
20 time as he has a history of bouncing checks. The Claimant is able to  
21 perform simple and repetitive tasks. He would have mild difficulty  
22 with more detailed and complex tasks as he had difficulty with  
abstract thinking and divergent thinking.

23 He would be able to perform work activities on a consistent basis  
24 without special or additional supervision as I did not need to prompt  
him several times or repeat instructions during our interaction. He

1 would be able to accept instructions from supervisors as he was able  
2 to perform a specific three step command and follow directions  
3 during this interview. He would have difficulty interacting with co-  
4 workers due to anxious affect. He would have difficulty maintaining  
5 regular attendance due to increased anxiety and profound isolation.  
6 He may have difficulty completing a normal work week without  
7 interruptions due to his profound anxiety and isolation. He may  
8 have difficulty dealing with the usual stress encountered in  
9 competitive work.

10 (Tr. 267).

11 These conclusions are hardly a model of clarity and, understandably, they could be  
12 read to support a finding of disability or a finding of nondisability. The conclusions are  
13 ambiguous. The ALJ characterized Dr. Dauria's opinions as "equivocal" and this Court  
14 would agree with that assessment. But rather than evaluate the specific limitations noted  
15 by Dr. Dauria and relate those limitations to his findings regarding plaintiff's RFC, the  
16 ALJ simply rejected Dr. Dauria's findings because they were not based on "objective  
17 findings" but on claimant's subjective reports. Again, an examining psychiatrist's  
18 "comprehensive psychiatric evaluation" is based on more than subjective complaints and  
19 is considered an objective, rather than subjective, analysis. While Dr. Dauria's opinions  
20 may be equivocal, they certainly do not support the ALJ's conclusions regarding  
21 plaintiff's ability to engage in substantial gainful activity for a continuous period of not  
22 less than twelve months. For these reasons, this Court concludes that the ALJ's findings  
23 are not supported by substantial evidence in the record as a whole. *See Bayliss v.*  
24 *Barnhart*, 427 F.3d 1211, 1214 n.1 (9th Cir. 2005) (citing *Tidwell v. Apfel*, 161 F.3d 599,  
601 (9th Cir. 1999))

1       Following remand of this matter, if the ALJ determines again not to rely on the  
2 functional assessment from plaintiff's examining doctors, the ALJ must explain  
3 adequately why his interpretation of the medical evidence is more correct than those of  
4 the doctors. *See Reddick, supra*, 157 F.3d at 725; *see also Blankenship, supra*, 874 F.2d  
5 at 1121 ("When mental illness is the basis of a disability claim, clinical and laboratory  
6 data may consist of the diagnosis and observations of professional trained in the field of  
7 psychopathology. The report of a psychiatrist should not be rejected simply because of  
8 the relative imprecision of the psychiatric methodology or the absence of substantial  
9 documentation") (*quoting Poulin v. Bowen*, 817 F.2d 865, 873074 (D.C. Cir. 1987)). This  
10 is important especially in this case, where plaintiff suffers from mental impairments and  
11 the ALJ seeks to discount the opinions of examining doctors who have performed mental  
12 status examinations.  
13

14       The mental status examination generally is conducted by medical professionals  
15 skilled and experienced in psychology and mental health. Although "anyone can have a  
16 conversation with a patient, [] appropriate knowledge, vocabulary and skills can elevate  
17 the clinician's 'conversation' to a 'mental status examination.'" *Trzepacz, supra*, The  
18 Psychiatric Mental Status Examination 3. A mental health professional is trained to  
19 observe patients for signs of their mental health not rendered obvious by the patient's  
20 subjective reports, in part because the patient's self-reported history is "biased by their  
21 understanding, experiences, intellect and personality" (*id.* at 4), and, in part, because it is  
22 not uncommon for a person suffering from a mental illness to be unaware that his  
23 "condition reflects a potentially serious mental illness." *Van Nguyen v. Chater*, 100 F.3d  
24

1 1462, 1465 (9th Cir. 1996). Therefore, it is important especially in this matter for the ALJ  
2 to credit appropriately the opinions of plaintiff's doctors and psychologists.

3 The ALJ also rejected the conclusions of Linda McNellis, MSW, LICSW, who  
4 assessed plaintiff with marked limitations in his ability to understand and follow simple  
5 instructions and his ability to relate appropriately with co-workers and supervisors. She  
6 also assessed severe limitations in his ability to interact appropriately with the public.  
7 Again, the ALJ rejected these opinions largely because they were not based on objective  
8 mental status examinations, but rather claimant's subjective descriptions of his symptoms  
9 (Tr. 32). Ms. McNellis concluded that plaintiff was "not capable of doing any work" and  
10 the ALJ concluded that her opinion was "unsupported and not consistent with the record"  
11 (Tr. 32).  
12

13 Pursuant to the relevant federal regulations, in addition to "acceptable medical  
14 sources," that is, sources "who can provide evidence to establish an impairment," *see* 20  
15 C.F.R. § 404.1513 (a), there are "other sources," such as friends and family members,  
16 who are defined as "other non-medical sources," *see* 20 C.F.R. § 404.1513 (d)(4), and  
17 "other sources" such as nurse practitioners and chiropractors, who are considered other  
18 medical sources<sup>1</sup>, *see* 20 C.F.R. § 404.1513 (d)(1). *See also Turner v. Comm'r of Soc.*  
19 *Sec.*, 613 F.3d 1217, 1223-24 (9th Cir. 2010) (*citing* 20 C.F.R. § 404.1513(a), (d)); Social  
20 Security Ruling "SSR" 06-3p, 2006 SSR LEXIS 5, 2006 WL 2329939. An ALJ may  
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22  
23 <sup>1</sup> "Other sources" specifically delineated in the relevant federal regulations also  
24 include "educational personnel," *see* 20 C.F.R. § 404.1513(d)(2), and public and private  
"social welfare agency personnel," *see* 20 C.F.R. § 404.1513(d)(3).

1 disregard opinion evidence provided by “other sources,” characterized by the Ninth  
2 Circuit as lay testimony, “if the ALJ ‘gives reasons germane to each witness for doing  
3 so.’ *Turner, supra*, 613 F.3d at 1224 (citing *Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir.  
4 2001)); see also *Van Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996). This is  
5 because “[i]n determining whether a claimant is disabled, an ALJ must consider lay  
6 witness testimony concerning a claimant's ability to work.” *Stout v. Commissioner,*  
7 *Social Security Administration*, 454 F.3d 1050, 1053 (9th Cir. 2006) (citing *Dodrill v.*  
8 *Shalala*, 12 F.3d 915, 919 (9th Cir. 1993)).

9  
10 The Ninth Circuit has characterized lay witness testimony as “competent  
11 evidence,” noting that an ALJ may not discredit “lay testimony as not supported by  
12 medical evidence in the record.” *Bruce v. Astrue*, 557 F.3d 1113, 1116 (9th Cir. 2009)  
13 (quoting *Van Nguyen, supra*, 100 F.3d at 1467) (citing *Smolen v. Chater*, 80 F.3d 1273,  
14 1289 (9th Cir. 1996)).

15 Ms. McNellis’ opinions are evaluated as lay testimony under this standard. The  
16 ALJ’s discrediting of Ms. McNellis’ conclusions based simply on the statement that her  
17 opinion is “unsupported and inconsistent with the record” does not meet the legal  
18 standard for rejecting this evidence. He also concluded that “there were no significant  
19 objective mental status examination findings contained in the evaluation to support the  
20 limitations” (Tr. 32). Again, the record includes a “Mental Status Exam-Reassessment”  
21 that Ms. McNellis completed on October 1, 2010, which noted a number of observations  
22 in her office that were consistent with his reports of, among other things, depression,  
23  
24

1 anxiety, low energy, and other symptoms consistent with plaintiff's previous diagnosis  
2 of bipolar 1 disorder and depression (*see* Tr. 336 – 40).

3 For these reasons, this matter should be reversed and remanded for further  
4 consideration of these findings.

5 Plaintiff requests that this matter be reversed and remanded for the immediate  
6 award of benefits (ECF. No. 17, page 22). Rather, this matter should be remanded for  
7 further administrative proceedings.

8 Generally when the Social Security Administration does not determine a  
9 claimant's application properly, "the proper course, except in rare circumstances, is  
10 to remand to the agency for additional investigation or explanation." *Benecke v.*  
11 *Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004) (citations omitted). However, the Ninth  
12 Circuit has put forth a "test for determining when evidence should be credited and  
13 an immediate award of benefits directed." *Harman v. Apfel*, 211 F.3d 1172, 1178,  
14 2000 U.S. App. LEXIS 38646 at \*\*17 (9th Cir. 2000). It is appropriate where:

15  
16 (1) the ALJ has failed to provide legally sufficient reasons for  
17 rejecting such evidence, (2) there are no outstanding issues that  
18 must be resolved before a determination of disability can be  
19 made, and (3) it is clear from the record that the ALJ would be  
required to find the claimant disabled were such evidence  
credited.

20 *Harman*, 211 F.3d at 1178 (*quoting Smolen v. Chater*, 80 F.3d 1273, 1292 (9th  
21 Cir.1996)).

22 Here, outstanding issues must be resolved. *See Smolen*, 80 F.3d at 1292. There is a  
23 large volume of medical and other evidence, and the record is not conclusive.  
24

1 Furthermore, the decision whether to remand a case for additional evidence or simply to  
2 award benefits is within the discretion of the court. *Swenson v. Sullivan*, 876 F.2d 683,  
3 689 (9th Cir. 1989) (citing *Varney v. Secretary of HHS*, 859 F.2d 1396, 1399 (9th Cir.  
4 1988)).

5 The ALJ is responsible for determining credibility and resolving ambiguities and  
6 conflicts in the medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998);  
7 *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995). If the medical evidence in the  
8 record is not conclusive, sole responsibility for resolving conflicting testimony and  
9 questions of credibility lies with the ALJ. *Sample v. Schweiker*, 694 F.2d 639, 642 (9th  
10 Cir. 1999) (quoting *Waters v. Gardner*, 452 F.2d 855, 858 n.7 (9th Cir. 1971) (citing  
11 *Calhoun v. Bailar*, 626 F.2d 145, 150 (9th Cir. 1980))).

12 Therefore, remand is appropriate to allow the Commissioner the opportunity to  
13 consider properly all of the medical evidence as a whole and to incorporate the properly  
14 considered medical evidence into the consideration of plaintiff's residual functional  
15 capacity. *See Sample, supra*, 694 F.2d at 642.

16 In addition, a determination of a claimant's credibility relies in part on the  
17 assessment of the medical evidence. *See* 20 C.F.R. § 404.1529(c). This Court already has  
18 determined that the ALJ failed to evaluate properly the medical evidence. The Court also  
19 notes that, the ALJ relied in large part on the flawed evaluation of the medical evidence  
20 when making his findings regarding plaintiff's credibility.  
21

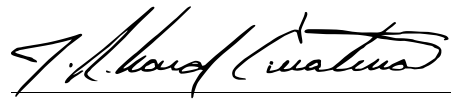
22 Therefore, plaintiff's testimony and credibility also must be assessed anew  
23 following remand of this matter.  
24

CONCLUSION

Based on these reasons and the relevant record, the Court **ORDERS** that this matter be **REVERSED** and **REMANDED** pursuant to sentence four of 42 U.S.C. § 405(g) to the Commissioner for further consideration.

**JUDGMENT** should be for plaintiff and the case should be closed.

Dated this 5th day of October, 2012.

A handwritten signature in black ink, appearing to read "J. Richard Creatura", written over a horizontal line.

J. Richard Creatura  
United States Magistrate Judge